No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1954

THE UNITED STATES, PETITIONER

v.

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 14–25) is reported at 117 F. Supp. 181.

JURISDICTION

The judgment of the Court of Claims was entered December 1, 1953. (R. 14, 24, 29.) The petition for a writ of certiorari was filed March 1, 1954, and was granted May 17, 1954. (R. 41.) The jurisdiction of this Court rests on 28 U. S. C., Section 1255 (1).

QUESTION PRESENTED

Whether interest is payable on the full amount of deficiencies in excess profits taxes, from the time the returns were due and the taxes were payable, where portions of the deficiencies were subsequently extinguished by reason of the granting of applications for relief under Section 722 of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions (Sections 52, 53, 56, 271, 272, 292, 294, 710, 722, 728, 729, and 3771 of the Internal Revenue Code) and Treasury Regulations (Treasury Regulations 109, Section 30.722–5) are set forth in the Appendix, *infra*, pp. 34–47.

STATEMENT

The facts, which are undisputed, are set forth in the findings entered by the Court of Claims (R. 25–29) and may be summarized as follows:

The taxpayer corporation[1] filed tax returns for 1940 and 1941 (the taxable years) in which it reported an excess profits tax liability of $6,512.76 for 1940, and $1,781,288.14 for 1941, and it paid these amounts in installments (R. 25–26). On September 15, 1943, it filed applications under

[1] Koppers Company, Inc., is the successor by a 1944 merger of Koppers United Company and its subsidaries, which filed consolidated excess profits tax returns for the taxable years (R. 25–26). For convenience both the Koppers Company and its predecessor are referred to as the taxpayer.

Section 722, a provision authorizing relief to a taxpayer which establishes that in the particular circumstances the computation of the tax has resulted in an "excessive and discriminatory" levy. Amended applications for relief were filed in 1945. On December 16, 1950, the taxpayer executed an "Agreement to Amount of Constructive Average Base Period Net Income Determined Under Section 722" for the taxable years, which amounts were approved by the Excess Profits Tax Council of the Internal Revenue Service (then called the Internal Revenue Bureau) on January 10, 1951 (R. 26).

At various times beginning in 1946 the Internal Revenue Agent in Charge transmitted to taxpayer copies of Revenue Agents' reports covering examination of its excess profits tax returns for the taxable years. The final transmittal letter, dated February 9, 1951, reflected an agreement which had been reached between taxpayer and the Internal Revenue Service with respect to the amount of taxpayer's excess profits tax liability both before and after the allowance of Section 722 relief. The computations agreed upon showed deficiencies in excess profits tax payments, before application of Section 722, of $460,408.91 for 1940 and $426,730.95 for 1941; and residual deficiencies, after application of Section 722, of $260,554.39 for 1940 and $95,749.33 for 1941. These computations were made by the Commissioner in accordance with the administrative prac-

tice of first determining the excess profits tax liability without the allowance of any relief provided by Section 722, and then giving effect to the relief allowed under that section. On February 14, 1951, the taxpayer filed a waiver consenting to the assessment and collection of the net deficiencies remaining after the application of Section 722. On March 8, 1951, the Commissioner issued a statutory notice of deficiencies in those amounts (R. 26–28).

On April 17, 1951, pursuant to the waiver filed February 14, 1951, the Commissioner assessed deficiencies in excess profits taxes in the net amounts remaining after giving effect to the allowance of Section 722 relief. At the same time, the Commissioner assessed interest of $217,376.07 for 1940 and $230,504.86 for 1941. The interest for 1940 was computed upon the sum of $460,-408.91 (the original deficiency before allowance of Section 722 relief), and for the period beginning March 15, 1941 (the due date of the 1940 return), to January 28, 1949 (which was treated as the date of payment of the net deficiency after allowance of Section 722 relief). The interest for 1941 was computed upon the sum of $426,-730.95 (the original deficiency before allowance of Section 722 relief), and for the period March 15, 1942 (the due date of the 1941 return), to March 16, 1951 (which was thirty days after the filing of the waiver of February 14, 1951) (R. 28–29).

The taxpayer paid the amounts of the deficiencies and interest assessed, and then filed claims for refund of $94,358.71 of the interest paid for 1940 and $178,784.48 of the interest paid for 1941. The amounts claimed represent interest due on those portions of the original deficiencies which were abated by reason of the subsequent allowance of Section 722 relief (R. 29). Following rejection of the claims, this suit for refund was timely instituted in the Court of Claims (R. 1–7).

The Court of Claims entered judgment for the taxpayer in the amounts claimed (less a conceded set-off of a minor amount), together with interest (R. 29).

SUMMARY OF ARGUMENT

In holding that interest was owing by taxpayer only on the amounts of the excess profits tax deficiencies remaining after the granting of its application for relief under Section 722 of the Internal Revenue Code, rather than on the full amounts of the deficiencies existing when the returns were due and the taxes were payable, the court below disregarded the controlling statutory provisions and departed from the principles established by this Court's decision in *Manning* v. *Seeley Tube & Box Co.*, 338 U. S. 561. The decision below places a premium upon failure to pay the correct amount of tax on the return date by permitting delinquent taxpayers to retain,

interest-free, monies which rightfully should have been paid to and held by the United States.

Taxpayer was obliged under the taxing statute (Code Secs. 53 (a) and 56 (a)) to return and pay the total amount of its 1940 and 1941 taxes by March 15 of 1941 and 1942, respectively. It erroneously computed the tax for each year, as the result of which it admittedly reported and paid substantially less than the taxes then due. The difference between the correct tax and the amount paid on the return date constituted a "deficiency" (Sec. 271), and interest on each deficiency was payable from the time the tax was payable (Sec. 292). The deficiencies were not "potential," as the majority of the court below characterized them. They arose in fact when the taxpayer failed to pay the full amounts due on the respective return dates. They actually continued in existence until extinguished by the subsequent allowance of Section 722 relief. By paying less than the full amount of taxes due, when they were due, taxpayer deprived the Government of the use of the funds for the intervening period, and it must therefore compensate the Government, by payment of interest as required by the statute, for the loss of that use.

Nothing in Code Section 722 or its history warrants the view, on which the decision below rests, that taxpayer was retroactively relieved of the duty to report and pay the correct amount of 1940 and 1941 taxes immediately when due,

merely because it subsequently applied for and was granted (in 1951) tax relief under Section 722. On the contrary, it is apparent from the provisions of Section 722 as a whole (and of subsection (d) in particular), from the legislative history of that Section and from related statutory provisions, that the extinguishment of a deficiency (or a portion thereof) by reason of an allowance of Section 722 relief does not operate retroactively to excuse the taxpayer, *ab initio,* from reporting and paying the correct tax on the due date.

Section 722 (d) expressly commands the taxpayer to compute and pay the tax on the return date without the benefit of any claimed relief under that section, and it affords the taxpayer a period of time thereafter within which to apply for such relief. Moreover, subsection (a) requires the corporation seeking relief to meet certain conditions: It must show that the tax previously computed and paid was excessive and discriminatory, and it must establish a "fair and just" constructive average base period net income to be used in redetermining the tax. These provisions, and the implementing Treasury Regulations, make it clear that Section 722 was not designed to alter the taxpayer's duty to pay the correct tax on the return date. And they completely refute the assumption, implicit in the decision below, that a taxpayer may withhold from the Government, interest-free, a portion of the

tax payable on the return date in the hope of later obtaining an equivalent amount of tax reduction under Section 722. Had Congress intended to permit deferment of payment of taxes pending the determination of whether (and the extent to which) an application for relief under Section 722 was allowable, it could readily have said so; in fact, however, it unequivocally said the opposite.

The only exception to the congressional mandate that the taxpayer must compute and pay the tax in full on the return date without the benefit of any claimed Section 722 relief is the one specifically carved out in Section 722 (d), namely, a situation covered by Section 710 (a)(5), and admittedly taxpayer does not fall within the exception. Under the construction of Section 722 adopted by the court below, the exception becomes superfluous.

That Congress never intended to authorize the withholding of part of the tax due on the return date, merely because some Section 722 relief might later be allowed, is confirmed by Code Section 3771 (g). Under that Section, as it applies to the taxable years here involved, a corporation which correctly stated its excess profit taxes and paid them when they were due could not obtain interest on any amount refunded by the Government as the result of the subsequent allowance of Section 722 relief. To hold that a corporation

which underpays the tax on the return date may retain the use of the money interest-free for the intervening period, while one which pays the lawful tax promptly is precluded both from having the use of the money and receiving interest from the Government for its use, is to attribute to Congress an intention—nowhere suggested in the statute or its history—to accord more favorable treatment to delinquent taxpayers than to those who comply with the law.

Such a result, moreover, is irreconcilable with this Court's decision in the *Seeley* case. While that case involved the complete cancellation of a deficiency by virtue of a net operating loss carryback adjustment, and this one a partial cancellation of a deficiency by virtue of relief adjustment under Section 722, the rationale of *Seeley* applies here with full force.

ARGUMENT

HAVING UNDERPAID ITS 1940 AND 1941 EXCESS PROFITS TAXES WHEN THE RETURNS WERE DUE ON MARCH 15 OF THE SUCCEEDING YEARS, TAXPAYER IS NOT ENTITLED TO A REFUND OF INTEREST PAID ON THE DEFICIENCIES MERELY BECAUSE PORTIONS OF THE DEFICIENCIES WERE LATER CANCELLED UPON THE ALLOWANCE OF RELIEF UNDER SECTION 722 OF THE INTERNAL REVENUE CODE

There is no dispute that in its tax returns for 1940 and 1941 (the taxable years), taxpayer understated its excess profits tax liability and to that

extent underpaid the taxes which should have been reported and paid on March 15th of the succeeding years.[2] By applications filed in September 1943, and amended in 1945, it sought relief, pursuant to Section 722 (d) of the Internal Revenue Code (Appendix, *infra*, pp. 43–44), in respect of its liability for each of the taxable years. Relief was ultimately granted in 1951 on the basis of a 1950 agreement reached between taxpayer and the Commissioner as to the amount of constructive average base period net income under Section 722. Notwithstanding the grant of this relief, substantial deficiencies remained. After final audit, the Commissioner computed and determined the excess profits tax deficiencies both before and after applying Section 722 relief. In March 1951, he issued a statutory notice of deficiencies in the net amounts remaining after the allowance of Section 722 relief. In April 1951, the Commissioner duly assessed deficiencies in these net amounts, and at the same time assessed interest on the original deficiencies (before allowance of Section 722 relief) from the

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[2] The underpayments are attributable to uncontested non-Section 722 adjustments in taxpayer's excess profits tax returns (*i. e.*, adjustments other than those arising from the later allowance of relief under Code Section 722), and the parties are in agreement as to the amounts of the underpayments (Finding 9, R. 27–28). See also affidavit of McLaughlin, R. 31–35, and Exhibits I and J, attached thereto (R. 36A–38A).

time the 1940 and 1941 returns were due.[3] Taxpayer paid the deficiencies and interest assessed, but claimed a refund to the extent that the Commissioner assessed interest on those portions of the deficiencies which were subsequently abated by reason of the allowance of relief under Section 722.

Sustaining the taxpayer's position, the Court of Claims held in substance that taxpayer's obligation to report and pay the correct amount of tax on the pertinent return dates was retroactively expunged, *pro tanto,* by virtue of the subsequent filing and granting of applications for relief pursuant to Section 722.

The narrow issue thus framed is essentially the same issue as was presented in *Manning* v. *Seeley Tube & Box Co.,* 338 U. S. 561. Holding in that case that interest was payable on a deficiency from the time the return was due, despite later cancellation of the deficiency by operation of the "carry-back" provisions of the Code, this Court stated (p. 566): "In the absence of a clear legislative expression to the contrary, the question of who properly should possess the right of use of the money owed the Government for the period it is owed must be answered in favor of the Government."

We shall urge that the statutory provisions

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[3] The commencement and terminal dates of the period for computing the interest are not in issue (Finding 11, R. 28). The controversy relates solely to whether the interest is to be computed on the entire amounts of the deficiencies or only on the amounts remaining after the Section 722 adjustment.

before the Court in the instant case, far from expressing an intent that the allowance of Section 722 relief shall absolve the taxpayer from the duty to pay interest on a pre-existing deficiency, point conclusively the other way. If this analysis is correct, it follows that there is no basis for the Court of Claims' departure from the principles enunciated by this Court in *Seeley,* and that the decision of the Court of Appeals for the Fifth Circuit in the *Premier Oil* case (No. 41, to be argued with this case), applying the *Seeley* doctrine to a factual situation indistinguishable from the one presented here, represents the correct view.

A. TAXPAYER WAS OBLIGED TO COMPUTE AND PAY THE CORRECT AMOUNT OF ITS 1940 AND 1941 TAXES BY MARCH 15 OF THE FOLLOWING YEARS, AND TO PAY INTEREST ON THE DEFICIENCIES FROM THOSE DATES

Since taxpayer reported its taxes on a calendar year basis (R. 25), it was required to file its returns for 1940 and 1941 on or before March 15 of the succeeding years. Internal Revenue Code, Secs. 52 (a) and 53 (a). (Appendix, *infra,* p. 34.) It was required to compute and pay, by those same dates, "The total amount of tax imposed" on its net income. (Sec. 56 (a), Appendix, *infra,* pp. 34–35.)[4] The statutory require-

[4] The 1940 and 1941 excess profits taxes were paid by the taxpayer in installments as permitted by Section 56 (b). Interest on the deficiencies (computed without the Section

ments relating to returns and payment of income tax apply also to the excess profits tax. Secs. 728, 729 (Appendix, *infra*, p. 44).

Section 271 (a) (Appendix, *infra*, p. 35) defines a "deficiency" in tax as "The amount by which the tax imposed * * * exceeds the amount shown as the tax by the taxpayer upon his return." In this case the taxpayer filed its returns for 1940 and 1941, and paid the taxes shown to be due thereon,[5] but the returns failed to show the correct amounts of excess profits taxes then due. As a consequence, the taxpayer paid substantially less than the amounts it should have paid on March 15 of 1941 and 1942, respectively, and the Commissioner determined deficiencies (both before and after application of Section 722 relief) in amounts which are not in dispute (R. 27–28, 33–34).

Code Section 292 (Appendix, *infra*, p. 37) provides that "Interest upon the amount determined as a deficiency * * * be paid * * * at the rate of 6 per centum per annum *from the date prescribed for the payment of the tax*" (italics ours), and that it shall be assessable at the same

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722 relief) for these years, which is the nub of the controversy, runs from the dates when the first installments were due, i. e., March 15, 1941 and 1942 (Code Sec. 292). For purposes of simplicity, in discussing the due date for the payment of taxes, the brief will disregard the provision for installment payments.

[5] The returns were filed after March 15 of the following years (R. 25), but their timeliness is not in question.

time as the deficiency.[6] Since the taxpayer understated, and underpaid, its taxes on the date prescribed for payment, the Commissioner properly assessed interest on the entire amounts of the deficiencies at the same time that he assessed the net amounts of the deficiencies remaining after the allowance of Section 722 relief (R. 28–29).

In characterizing the portions of the deficiencies which were subsequently cancelled by the Section 722 adjustment as "potential" deficiencies which taxpayer was "never required to pay" (R. 14–15, 23), the court below failed to heed the statutory provisions for prompt and full payment of taxes on a specified date. As this Court stated in the *Seeley* case (pp. 565–566):

> The general statutory scheme which presents the problem is as follows: As of a certain date the taxpayer has a duty to file a return for the previous fiscal year and pay the amount of the tax actually due for that year. If this return is erroneously

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[6] Where the taxpayer reports the correct amount of tax, but fails to pay the amount reported, interest is likewise payable from the date prescribed for payment. Sec. 294 (a). Even where extensions of time for payment of the tax are granted, interest is payable. Secs. 56 (c), 295, 296. Interest also runs on unpaid interest. Sec. 294 (b). The court below erroneously assumed (R. 22–23) that the only sanctions imposed for failure to make timely payment of the correct tax, where Section 722 relief is later allowed, are the "penalty" provisions of the Code (Secs. 291, 293), prescribing additions to the tax for negligence or fraud. As was noted in the *Seeley* case (p. 566), the interest and penalty provisions are separate.

> calculated and the payment is less than the tax properly due, the Commissioner, using the procedure appropriate to the particular situation, may assess a deficiency, the difference between the tax imposed by law and the tax shown upon the return. Interest upon this deficiency at the rate of six per cent from the date the tax was lawfully due to the date of the assessment is assessed at the same time as the deficiency. * * *
>
> We hold that the interest was properly withheld by the Collector. The subsequent cancellation of the duty to pay this assessed deficiency does not cancel in like manner the duty to pay the interest on that deficiency. From the date the original return was to be filed until the date the deficiency was actually assessed, the taxpayer had a positive obligation to the United States: a duty to pay its tax. * * * For that period the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States. The fact that the statute permits the taxpayer subsequently to avoid the payment of that debt in no way indicates that the taxpayer is to derive the benefits of the funds for the intervening period. * * *

The deficiencies on which the interest here in controversy was assessed may no more be considered "potential," simply because they were later partially cancelled, than were the com-

pletely cancelled deficiencies involved in the *Seeley case*. See also, *Babcock & Wilcox Co.* v. *Pedrick*, 212 F. 2d 645, 647–650 (C. A. 2d), petition for certiorari filed July 3, 1954, No. 190. The taxpayer having failed to pay the correct amount of taxes when payment was due, the deficiencies actually came into being at that time, and they remained real deficiencies even though they were later extinguished in part.[7] By paying less than the amounts due, the taxpayer deprived the Government of the use of the money for the intervening period, and the manifest purpose of the interest provision of the taxing statute is to compensate the Government for the loss of that use. In the words of this Court in *Seeley* (p. 566), "For that period the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States."

B. THE SUBSEQUENT CANCELLATION OF PORTIONS OF THE DEFICIENCIES, BY REASON OF THE GRANTING OF AN APPLICATION FOR RELIEF UNDER CODE SECTION 722, DID NOT RETROACTIVELY RELIEVE TAXPAYER OF THE DUTY TO MAKE TIMELY PAYMENT OF ITS TAXES

The decision below rests on the proposition (R. 19–20) that Code Section 722 was intended to operate retroactively, to the extent of any relief

[7] As the dissenting opinion below observed (R. 24), "The simple fact is that the plaintiff failed to pay the tax which the statute imposed and required, and that there was, in fact, a deficiency, which persisted until it was finally learned what relief the plaintiff was entitled to."

ultimately granted under that section, in determining excess profits tax liability. Thus the majority of the court below attempted (R. 21–22) to distinguish this case from *Seeley* on the ground that "Section 122 [the carryback provision there involved] is designed to become operable after some economic reversal in a future taxable period, while Section 722 is operable, if at all, from the time the return is filed."[8] Proceeding on this theory, it concluded that the relief granted to taxpayer here in 1951 served to excuse it, *ab initio,* from making full and timely payment of its 1940 and 1941 taxes when the returns for those years were due.

Nothing in Section 722 or its history, however, justifies this interpretation. On the contrary, it is apparent from the section as a whole, and from subsection (d) in particular, to say nothing of related provisions of the Code, that there was no intention to derogate from the statutory scheme for the prompt and full payment of the tax for any taxable year on the date the return for that year is due. Under the construction adopted by

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[8] Emphasizing the use of such words as "determined" and "in lieu of" in Section 722 (a) (R. 19), the court agreed (R. 22) with the construction placed upon Section 722 by the District Court in *Kuder Citrus Pulp Co.* v. *United States*, 117 F. Supp. 395 (S. D. Fla.), where it was stated (p. 399) that the section "does not forbid retroactive application of the relief when determined by the Commissioner." An appeal from this decision is pending in the Court of Appeals for the Fifth Circuit.

the court below, any corporation subject to excess profits tax would be invited to hazard a guess, on the date its return was due, whether and to what extent an application for relief under Section 722 might later be granted. What is more, it would be authorized to withhold from the tax payable on that date, interest-free, such amount as might finally be allowed as relief under that section. Such an interpretation is not only repugnant to the statutory pattern for the payment of taxes by a certain date; it also ascribes to Congress an intention to discriminate against corporations which pay the correct amount of tax on the due date by rewarding those which gamble on the prospects of a future allowance of Section 722 relief.

To place the relief aspects of Section 722 in their statutory context, we refer briefly to the provisions establishing an excess profits tax for the taxable years here involved.[9] The tax, it will be noted, is imposed on the adjusted excess profits net income (Code Sec. 710 (a) and (b)). The most important adjustment factor is the excess profits credit, which may be determined in either of two ways—under the income method (Sec. 713)

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[9] Subchapter E of Chapter 2 of the Internal Revenue Code, constituting the "Excess Profits Tax Act" of 1940, and more commonly known as the World War II Excess Profits Tax law, was added to the Code by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974. The tax was repealed by Sec. 122 (a) of the Revenue Act of 1945, c. 453, 59 Stat. 556, effective for taxable years beginning after 1945.

or the invested capital method (Sec. 714). Under the income method, the credit is a specified percentage of the "average base period net income," i. e., the average annual income of a prior four-year period (1936–1939, inclusive).

Section 722 affords relief in cases where use of the average base period net income or the statutory invested capital "results in an excessive and discriminatory tax * * *" (subsection (a)). It provides that if the taxpayer "establishes" (1) that the tax computed "without the benefit of this section" is excessive, and (2) "what would be a fair and just amount representing normal earnings" for the base period, then "the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income" otherwise determined (*Ibid.*).

Subsection (d) of Section 722, entitled "*Application for Relief Under this Section,*" states:

> *The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section,* except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. * * * [Italics ours.]

This subsection (which was enacted in substantially its present form by Section 6 of the Excess Profits Tax Amendments of 1941[10]) was explained in the House and Senate Committee Reports as follows:[11]

> The taxpayer must first compute and pay his tax without regard to this relief provision and then must petition the Commissioner for relief by way of claim for refund.
>
> Your committee feel that so safeguarded and restricted this relief provision, though broad and general in nature, will satisfactorily alleviate hardships due to abnormal conditions in the base period, and at the same time prevent abuses.
>
> * * * * *
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> It is deemed advisable in the interests of good administration, in view of the nature of the problem presented by section 722, that the taxpayer should not be permitted to apply the section in the computation of the excess-profits tax liability shown upon its return and that the tax-

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[10] c. 10, 55 Stat. 17. The provisions first appeared as subsection (e) of Section 722. The exception relating to Code Section 710 (a) (5) was added by Section 222 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798. Amendments enacted by Section 1 of the Act of December 17, 1943, c. 346, 57 Stat. 601, extended the time for filing applications for relief.

[11] H. Rep. No. 146, 77th Cong., 1st Sess., pp. 4, 13 (1941–1 Cum. Bull. 550, 552, 559); S. Rep. No. 75, 77th Cong., 1st Sess., pp. 4, 13 (1941–1 Cum. Bull. 564, 565).

> payer should be required to conform to reasonable restrictions with respect to the time within which it may make application for the benefits of the section. Accordingly, under the provisions of subsection (d) a taxpayer is not permitted to claim the benefits of section 722 in computing its tax upon the return. A taxpayer, in order to obtain the benefits of section 722, must make an application to the Commissioner of Internal Revenue under regulations to be prescribed by the Commissioner with the approval of the Secretary of the Treasury.

It is thus plain from the language of Section 722 (d) and its legislative history that a taxpayer must file its excess profits tax return, and compute and pay the tax, without the benefit of any anticipated Section 722 relief. Indeed, the congressional intent to require computation and full payment of the tax when the return is due, without the application of Section 722, could hardly have been expressed in more unequivocal terms.

Furthermore, and quite apart from the mandate of subsection (d) of Section 722, it is evident from the provisions of subsections (a), (b) and (c) that a taxpayer is not automatically entitled to relief under that section as of the time the return is due. As a condition precedent to obtaining relief, it must "establish" the right to use a "constructive" average base period net income in lieu of the average base period net income otherwise determined—a time-consuming

process entailing proof and evaluation of a variety of complex accounting and economic factors. The applicant also has the burden of establishing the amount of relief to which it may be entitled. As the dissenting opinion below states (R. 25), "it is plain that it will take much study and analysis and the exercise of much judgment to make the final determination as to the amount of relief to be granted the taxpayer." The course of this very case (see Statement, *supra*, pp. 2–5) illustrates the soundness of this observation.

Congress recognized that there might be situations in which it would be inequitable to require full payment of the tax in advance of relief determinations under Section 722. Accordingly, Section 710 (a) (5) (Appendix, *infra*, pp. 38–39) was added to the Code by the Revenue Act of 1942,[12] to provide that if the adjusted excess profits tax net income (computed without reference to Section 722) exceeded 50 percent of the normal tax net income, and if the taxpayer claimed Section 722 relief in its return, there could be a deferment of payment to the extent of 33 percent of the reduction in tax claimed.[13]

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[12] Section 222 (b) of the Revenue Act of 1942, *supra*, effective under Section 201 for taxable years beginning after 1941.

[13] Even where the taxpayer qualifies for the privilege of deferred payment under Section 710 (a) (5), interest is payable from the return date on any excess of the amount deferred over the the amount of relief finally granted. *Squire* v. *Puget Sound Pulp & Timber Co.*, 181 F. 2d 745 (C. A. 9th); *Jones* v. *Johnson*, 176 F. 2d 693 (C. A. 10th).

The legislative history of this section confirms the Congressional intent to require immediate payment of the full tax on the return date, without the benefit of any claimed relief, in all other cases. Thus the Senate Finance Committee Report accompanying the 1942 Act stated: [14]

> Although it is believed advisable to require a taxpayer seeking relief under section 722 to compute and pay its tax without the benefit of such section, there are some cases in which it would be inequitable to compel the taxpayer to pay the entire amount of such tax. Section 710 (a) is therefore amended to provide that if the adjusted excess profits net income (computed without the benefit of sec. 722) for any taxable year in which the taxpayer claims relief under such section is in excess of 50 percent of the normal tax net income for such year (computed without the credit for adjusted excess profits net income) the amount of the tax payable at the time required for payment may be reduced by an amount equal to 33 percent of the reduction claimed in the tax.

The only exception to the mandate in Section 722 (d) that the tax be initially computed and paid without the benefit of Section 722 is the one there specifically carved out in favor of taxpayers who meet the conditions of Section 710 (a) (5). No claim is or can be made by taxpayer here that

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[14] S. Rep. No. 1631, 77th Cong., 2d Sess., p. 205 (1942-2 Cum. Bull. 504, 654-655).

it comes within the exception.[15] Had Congress intended to permit deferment of payment of the tax in all cases pending determination of an application for relief under Section 722, it could readily have said so.[16] Instead, in Section 710 (a) (5) it specified a limited exception. Under the construction of Section 722 adopted by the court below, the exception provision becomes superfluous.

In harmony with the above statutory provisions and their background, Section 30.722–5 of Treasury Regulations 109 (Appendix, *infra*, pp. 45–47), provides that, except as authorized by Code Section 710 (a) (5) and the Regulations,

> the taxpayer is not permitted to claim the benefits of section 722 in computing its excess profits tax on its return, but must compute its excess profits tax, file its excess

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[15] Section 722 (d) also provides that if a constructive average base period net income has already been determined for one taxable year, the Commissioner may by Regulations prescribe the extent to which its requirements may be waived for a future year. See also Section 30.722–5 (d), Treasury Regulations 109, as amended by T. D. 5393, 1944 Cum. Bull. 415. No such situation is here presented.

[16] Thus, the relief provisions of the Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137 (adding Code Secs. 430–472), enacted as a result of the Korean conflict, established formulas for automatically determining a substitute average base period net income (Code Secs. 442–446), and permitted the taxpayer to adjust its base period net income at the time the return was filed (Code Sec. 447 (e)). See S. Rep. No. 2679, 81st Cong., 2d Sess., pp. 17–21 (1951–1 Cum. Bull. 240, 251–254).

> profits tax return, and pay the tax thus shown on such return without regard to the provisions of section 722.

The Regulations also prescribe the form, time, and manner in which an application for relief under Section 722 is to be filed. And in keeping with the rule laid down in Section 722 (a) that the relief is allowable only if the taxpayer "establishes" its right thereto, the Regulations provide that the taxpayer has the burden of substantiating its claim to relief by clear and convincing evidence. Even if the statutory provisions requiring payment of the full tax on the return date could be said to be ambiguous, the contemporaneous construction embodied in the Commissioner's Regulations would be entitled to great weight in ascertaining their meaning. *Lykes* v. *United States,* 343 U. S. 118, 127; *Commissioner* v. *South Texas Co.,* 333 U. S. 496, 501.

The requirement of Section 292 that interest be paid on a "deficiency" (defined in Section 271 as the difference between the tax imposed and the tax shown on the return) must, of course, be read in conjunction with Section 294 (a) (Appendix, *infra,* p. 37), which requires payment of interest on the amount of tax shown on the return but not paid. Had taxpayer reported the correct amount of tax in its return, but failed to pay the amount reported because of anticipated Section 722 relief, interest on the unpaid portion unquestionably would be col-

lectible under Section 294 (a). No reason appears why its failure to report the correct amount of tax in the first instance should produce a different result, and it is inconceivable that Congress intended one. In the one case, as in the other, the taxpayer has had the use of the funds which should have been paid to the United States, and that is the essence of the obligation to pay interest. *Manning* v. *Seeley Tube & Box Co., supra,* p. 565. See also *Rodgers* v. *United States,* 332 U. S. 371, 374; *Billings* v. *United States,* 232 U. S. 261, 285–287.

If more were needed to demonstrate that Congress intended the Government to have the full amount of the tax from the time the return was due, without regard to the possibility of Section 722 relief, it is furnished by Code Section 3771 (g). That section, as applicable to the taxable years 1940 and 1941 involved in this case, precludes a taxpayer which paid the correct tax on time from receiving interest from the Government on the overpayment resulting from a subsequent allowance of Section 722 relief.[17] Parallel

[17] Section 3771 (g) was added to the Code by the Act of December 17, 1943, *supra.* For tax years subsequent to 1942, interest on such an overpayment was not to be paid for any period prior to one year after the filing of the application for relief or September 16, 1945, whichever was later.

The same Act added correlative Section 292 (b), containing parallel provisions regarding the payment of interest on a deficiency attributable to the granting of Section 722 relief. Section 292 (b) was addressed to an increase in

provisions in Section 3771 (e), restricting interest on overpayments resulting from net operating loss carrybacks, were deemed persuasive by this Court in the *Seeley* case (pp. 567–68). To hold that a corporation which failed to make timely payment of the tax might retain the use of the funds, interest-free, for the period intervening between the return date and the allowance of Section 722 relief, while one which did make timely payment was prohibited from receiving interest from the Government upon a refund of the overpayment, would, as stated in *Seeley* (p. 568), "place a premium on failure to conform diligently with the law".[18] Even if the statutory

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ordinary income tax which would automatically flow (by reason of a downward adjustment in the Section 26 (e) credit) from a reduction in excess profits tax. See 89 Cong. Record, Part 6, p. 8191 (1943); S. Rep. No. 508, 78th Cong., 1st Sess., p. 2.

[18] A simple illustration will serve to show the inequality of treatment that would result. Suppose that taxpayers A and B each have the same income and deductions for 1940, and that the correct tax for each, computed without the benefit of Section 722, is $1,000. On March 15, 1941, the return date, A correctly reports and pays $1,000, while B reports and pays only $700. Each taxpayer subsequently files an application for Section 722 relief, and the applications are eventually granted to the extent of allowing a $500 reduction in excess profits tax liability. As a result A is entitled to a refund of $500, while B's $300 deficiency is eliminated and it is entitled entitled to a $200 refund. Unless B is charged interest on the deficiency from the time the return was due, it will enjoy an advantage over A, which correctly reported its tax and is not entitled to interest on the overpayment. The Government had the right to re-

language and history were less than plain, the Court would attribute to Congress "a desire for equality among taxpayers * * * rather than the reverse." *Colgate Co.* v. *United States*, 320 U. S. 422, 425.

In sum, the statute shows clearly that Congress intended all taxpayers subject to excess profits tax liability to report and pay the full tax on the due date of the return, just as if Section 722 had not been enacted, except where deferment of payment of part of the tax is expressly permitted under Section 710 (a) (5). Since taxpayer here admittedly reported and paid less than the amounts of taxes which should have been reported and paid for the taxable years, and since it admittedly does not come within the exception, a deficiency existed with respect to each year and the Government was entitled to interest from the return dates. While the deficiencies were subsequently cancelled in part by reason of the filing and granting of applications for relief under Section 722, the crucial fact remains that the taxes were understated and underpaid when payment was due. As the dissenting opinion below states (R. 24), there is "no escape from the mandate of Section

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ceive $1,000 from both A and B on March 15, 1941, and the right to use that money interest-free until allowance of the relief. Under the decision below, B, which underpaid the tax by $300, would retain the use of that amount interest-free during the intervening period; while A, which overpaid the tax by $500 would have neither the use of that amount nor interest.

722 (d) * * *. If the plaintiff had done what the statute expressly requires, the Government would have had the money, the interest on which is here in question, until the amount of relief to which the plaintiff was entitled under the provisions of Section 722 (a), (b), and (c) was worked out between the taxpayer and the Government."

C. THE DECISION BELOW DEPARTS FROM THE PRINCIPLES ESTABLISHED BY THIS COURT'S DECISION IN MANNING V. SEELEY TUBE & BOX CO.

The problem here is basically no different from that which was resolved in the *Seeley* case. This Court there held that the elimination of deficiencies in income and excess profits taxes by application of the net operating loss carryback provisions of the taxing statute did not retroactively alter the taxpayer's duty to report and pay the correct amount of tax on the return date, and hence did not relieve the taxpayer of the obligation to pay interest on the deficiencies from that date. After pointing out that the statute imposes upon all taxpayers a duty to file returns and to compute and pay taxes as of a certain date, the Court stated (p. 566) that "the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States. The fact that the statute permits the taxpayer subsequently to avoid the payment of that debt in no way indi-

cates that the taxpayer is to derive the benefits of the funds for the intervening period."

The rationale of the *Seeley* decision applies with full force. Here, as there, the taxpayer was obligated to report and pay a certain amount of tax as of a certain date. And here, as there, the statute permitted the taxpayer, at a subsequent date, to avoid payment of that debt. The taxpayer's duty to pay interest on the debt may no more be regarded as having been discharged in this case than in that one. Indeed, the reasoning in *Seeley* applies *a fortiori* here. For it was there held that the taxpayer's obligation to pay the full tax on the return date remained unchanged notwithstanding the fact that the applicable statutory provisions (Secs. 122 (b) and 710 (c)) expressly permitted an automatic *"carry-back"* of an additional deduction to the taxable year involved.[19] Section 722 does not authorize an additional deduction, nor a "carry-back" adjustment of any kind; it merely provides for the future granting of special relief under specified conditions to be established by the taxpayer (in the form of an additional credit against the tax), and it explicitly demands computation and payment of the tax on the return date without the benefit of such relief.

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[19] The Court noted in *Seeley* (p. 567) that "for many purposes the carry-back is equivalent to a *de novo* determination of the tax," but nevertheless felt constrained to conclude that the carry-back provision "does not retroactively alter the duty of a taxpayer to pay his *full tax promptly*." [Italics ours.]

The majority of the court below viewed the *Seeley* decision as of "little assistance" here, on the assumption that an allowance of Section 722 relief is retroactively operable "from the time the return is filed" (R. 21–22). Yet the provisions of Section 722 are to be searched in vain for any support for that assumption, and subsection (d) flatly contradicts it. As the dissenting opinion below aptly observes (R. 24–25), the difference between this case and *Seeley* is as a practical matter "more apparent than real." The relief adjustment afforded by Section 722 no more comes into play *nunc pro tunc*, as of the time the return is due, than does the carry-back adjustment considered in *Seeley*. It is contingent upon future determinations as to whether relief is allowable at all and, if so, in what amount.[20] Under Section 722 (d) the application for relief may be filed in a taxable year subsequent to the year for which the relief is claimed, and subsequent even to the date on which the return is due. As pointed out above, no relief is allowable unless and until the taxpayer "establishes" the right to use a "constructive" average base period net income and the "fair and just amount" to be used. See also

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[20] The application for relief under Section 722 is treated as a "claim for refund", and if the Commissioner disallows the claim in whole or in part the Tax Court is given exclusive jurisdiction to review his determination. The decision of the Tax Court is not subject to further review. Code Section 732, as added by Section 9, Excess Profits Tax Amendments of 1941, *supra*.

Section 30.722–5 of Treasury Regulations 109. The vital consideration here, as in *Seeley*, is that the taxpayer was required on the return date to compute and pay the full tax—not an amount diminished by some anticipated or hoped-for adjustment of the tax—and that the Government may not be deprived of interest on any underpayment.[21]

We submit accordingly that the doctrine of the *Seeley* case is controlling and that the decision

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[21] In *Seeley* the deficiency was extinguished after it was formally assessed, while here the deficiencies were extinguished in part before they were assessed and only the unextinguished portions were assessed. The court below properly did not regard this as a material distinguishing feature, however, since the amounts of the deficiencies (both before and after the allowance of Section 722 relief) had been determined by the Commissioner and are not contested (R. 27–28, 33–38A). In *Rodgers* v. *United States*, 108 F. Supp. 727, the court below held that the Government could collect interest on a deficiency extinguished before its assessment. See also the decisions of the court below in *Henry River Mills Co.* v. *United States*, 96 F. Supp. 477, and *Linn Mills* v. *United States*, decided June 8, 1954 (1954 C. C. H., par. 9448). Nor has any significance been attached by other courts to non-assessment of extinguished deficiencies. See the decision of the Fifth Circuit Court of Appeals in the companion *Premier Oil* case (209 F. 2d 692); *Cumberland Portland Cement Co.* v. *United States*, 202 F. 2d 152 (C. A. 6th), affirming *per curiam*, 101 F. Supp. 577 (M. D. Tenn.); *De Soto Hardwood Flooring Co.* v. *United States* (W. D. Tenn.), decided December 20, 1950 (1951 P–H, par. 72,371). Cf. *Brandtjen & Kluge* v. *United States*, 78 F. Supp. 509 (D. Minn.); *Surface Combustion Corp.* v. *United States* (N. D. Ohio), decided November 25, 1953 (1953 P.–H, par. 72,804), pending on appeal to the Court of Appeals for the Sixth Circuit.

of the Court of Appeals in the companion case, *United States* v. *Premier Oil Co.*, No. 41, which is in direct conflict with the decision below, is correct.[22]

CONCLUSION

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

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[22] Compare *Cumberland Portland Cement Co.* v. *United States*, 202 F. 2d 152 (C. A. 6th), affirming *per curiam*, 101 F. Supp. 577 (M. D. Tenn.); *Standard Roofing & Material Co.* v. *United States*, 199 F. 2d 607 (C. A. 10th).

APPENDIX

Internal Revenue Code:

CHAPTER 1—INCOME TAX

* * * * *

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this chapter shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe. * * *

* * * * *

(26 U. S. C. Sec. 52.)

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) *Time for Filing.*—

(1) *General rule.*—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

* * * * *

(26 U. S. C. Sec. 53.)

SEC. 56. PAYMENT OF TAX.

(a) *Time of Payment.*—The total amount of tax imposed by this chapter

shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) *Installment Payments.*—The taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

* * * * *

(26 U. S. C. Sec. 56.)

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the

amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.
(26 U. S. C. Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *

* * * * *

(d) *Waiver of Restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on

the assessment and collection of the whole or any part of the deficiency.

* * * * *

(26 U. S. C. Sec. 272.)

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

(26 U. S. C. Sec. 292.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

(a) *Tax Shown on Return.*

(1) *General rule.*—Where the amount, determined by the taxpayer as the tax imposed by this chapter, or any installment thereof, or any part of such amount or installment, is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount at the rate of 6 per centum per annum from the date prescribed for its payment until it is paid.

* * * * *

(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in

section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272 (i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

* * * * *

(26 U. S. C. Sec. 294.)

CHAPTER 2—ADDITIONAL INCOME TAXES

SUBCHAPTER E—EXCESS PROFITS TAX

* * * * *

SEC. 710 [As added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Sec. 201 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. IMPOSITION OF TAX.

(a) *Imposition.*—

(1) *General rule.*—There shall be levied, collected, and paid, for each taxable year, on the adjusted excess profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) the tax shown in the following table:

* * * * *

[Added by Sec. 222 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798]

(5) *Deferment of payment in case of abnormality.*—If the adjusted excess profits

net income (computed without reference to section 722) for the taxable year of a taxpayer which claims on its return, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, the benefits of section 722, is in excess of 50 per centum of its normal tax net income for such year, computed without the credit provided in section 26 (e) (relating to adjusted excess profits net income), the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the amount of the reduction in the tax so claimed. For the purposes of section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return.

* * * * *

(26 U. S. C. Sec. 710.)

SEC. 722 [As added by Sec. 201 of the Second Revenue Act of 1940, *supra,* and amended by Sec. 222 (a) of the Revenue Act of 1942, *supra,* and the Act of December 17, 1943, c. 346, 57 Stat. 601]. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average

base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that, in the cases described in the last sentence of section 722 (b) (4) and in section 722 (c), regard shall be had to the change in the character of the business under section 722 (b) (4) or the nature of the taxpayer and the character of its business under section 722 (c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(1) in one or more taxable years in the base period normal production, output, or operation was interrupted or diminished because of the occurrence, either immediately prior to, or during the base period, of events unusual and peculiar in the experience of such taxpayer,

(2) the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such tax-

payer was a member was depressed by reason of temporary economic events unusual in the case of such industry,

(3) the business of the taxpayer was depressed in the base period by reason of conditions generally prevailing in an industry of which the taxpayer was a member, subjecting such taxpayer to

(A) a profits cycle differing materially in length and amplitude from the general business cycle, or

(B) sporadic and intermittent periods of high production and profits, and such periods are inadequately represented in the base period,

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. If the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. For the purposes of this subparagraph, the term "change in the character of the business" includes a change in the operation or management of the business, a difference in the products or services furnished, a difference in the capacity for production or operation, a difference in the ratio of nonborrowed capital to total capital, and the acquisition before January 1, 1940, of all or part of the assets of a competitor, with the result that the competition of such competitor

was eliminated or diminished. Any change in the capacity for production or operation of the business consummated during any taxable year ending after December 31, 1939, as a result of a course of action to which the taxpayer was committed prior to January 1, 1940, or any acquisition before May 31, 1941, from a competitor engaged in the dissemination of information through the public press, or substantially all the assets of such competitor employed in such business with the result that competition between the taxpayer and the competitor existing before January 1, 1940, was eliminated, shall be deemed to be a change on December 31, 1939, in the character of the business, or

(5) of any other factor affecting the taxpayer's business which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period and the application of this section to the taxpayer would not be inconsistent with the principles underlying the provisions of this subsection, and with the conditions and limitations enumerated therein.

(c) *Invested Capital Corporations, Etc.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer, not entitled to use the excess profits credit based on income pursuant to section 713, if the excess profits credit based on invested capital is an inadequate standard for determining excess profits, because—

(1) the business of the taxpayer is of a class in which intangible assets not includible in invested capital under section

718 make important contributions to income,

(2) the business of the taxpayer is of a class in which capital is not an important income-producing factor, or

(3) the invested capital of the taxpayer is abnormally low.

In such case for the purposes of this subchapter, such taxpayer shall be considered to be entitled to use the excess profits credit based on income, using the constructive average base period net income determined under subsection (a). For the purposes of section 713 (g) and section 743, the beginning of the taxpayer's first taxable year under this subchapter shall be considered to be that date after which capital additions and capital reductions were not taken into account for the purposes of this subsection.

(d) *Application for Relief Under this Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the

purpose of determining the tax under this subchapter for a subsequent taxable year.

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(26 U. S. C. Sec. 722.)

SEC. 728 [As added by Sec. 201 of the Second Revenue Act of 1940, *supra*]. MEANING OF TERMS USED.

The terms used in this subchapter shall have the same meaning as when used in Chapter 1.

(26 U. S. C. Sec. 728.)

SEC. 729. [As added by Sec. 201 of the Second Revenue Act of 1940, *supra*]. LAWS APPLICABLE.

(a) *General Rule.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

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(26 U. S. C. Sec. 729.)

CHAPTER 37—ABATEMENTS, CREDITS, AND REFUNDS

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SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

* * * * *

(g) [added by Sec. 2 (b) of the Act of December 17, 1943, *supra*] *Claims Based Upon Relief Under Section 722.*—If any part of an overpayment for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an

application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment. If any part of an overpayment for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later.

(26 U. S. C. Sec. 3771.)

SEC. 3794. INTEREST ON DELINQUENT TAXES.

Notwithstanding any provision of law to the contrary, interest accruing during any period of time after August 30, 1935, upon any internal-revenue tax (including amounts assessed or collected as a part thereof) not paid when due, shall be at the rate of 6 per centum per annum.

(26 U. S. C. Sec. 3794.)

Treasury Regulations 109, promulgated under the Internal Revenue Code:

Sec. 30.722–5 [As added by T. D. 5264, 1943 Cum. Bull. 761, and amended by T. D. 5393, 1944 Cum. Bull. 415]. *Application for Relief Under Section 722.*—(a) *Requirements for filing.*—Except as provided in section 710 (a) (5) and section 30.710–5 (relating to deferment of payment of excess profits tax in certain cases under section 722) and except as provided in (d) of this section, the taxpayer is not permitted to claim the benefits of section 722 in

computing its excess profits tax on its return, but must compute its excess profits tax, file its excess profits tax return, and pay the tax thus shown on such return without regard to the provisions of section 722. To obtain the benefits of section 722 for any taxable year beginning in 1940 or 1941, the taxpayer must, within the period of time for filing a claim for credit or refund and subject to the limitation as to amount of credit or refund prescribed by section 322 as applicable to the taxable year for which relief is claimed, file under oath an application on Form 991 (revised January, 1943) for the benefits of section 722, unless the provisions of (d) of this section are applicable to the taxpayer. Generally, an application for relief under section 722 must be filed for an excess profits tax taxable year within three years from the time the excess profits tax return for such year was filed, or within two years from the time the tax for such year was paid, whichever is the later. See section 322 and the regulations thereunder, however, as to the specific rules relating to the period of limitation upon the filing of claims for credit or refund, and the limitations upon the amount of credit or refund.

* * * * *

Except as otherwise provided in this section, the application on Form 991 (revised January, 1943) must set forth in detail and under oath each ground under section 722 upon which the claim for relief is based, and facts sufficient to apprise the Commissioner of the exact basis thereof. The mere statement of the provision or provisions of law under section 722 upon which the claim for relief is based shall not constitute an

application for relief within the meaning of section 722. It is incumbent upon the taxpayer to prepare a true and complete claim and to substantiate it by clear and convincing evidence of all the facts necessary to establish the claim for relief; failure to do so will result in the disallowance of the claim. * * *

* * * * *

(c) *Claim for refund.*—* * *

* * * * *

No interest shall be allowed or paid with respect to any part of an overpayment for a taxable year beginning in 1940 or 1941 which is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year. See section 3771 (g).

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